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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

PATRICIA LAIRD, a/k/a PATRICIA HORNE
and SHELTON FLETCHER HORNE,

Petitioners,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CASES INVOLVED

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 81-MO-46, filed September 2, 1981, as reproduced in Petitioner's Appendix A at pages 1-3.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the charge given by the court below create a mandatory or irrebuttable presumption arising from the possession of more than one ounce of marijuana under South Carolina Code Section 44-53-370 (d) (1976 Supp.)?

ARGUMENT

The charge given by the court below created no mandatory or irrebuttable presumption arising from the possession of more than one ounce of marijuana under South Carolina Code Section 44-53-370 (d) (1976 Supp.).

On this issue Petitioners claim that the presumption of intent to distribute

arising from possession of more than one ounce of marijuana unconstitutionally shifts the burden of proof. Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). The court below charged the language of the statute, stating that where there is "possession of more than 28 grams or one ounce [of marijuana], one shall be prima facie guilty of the offense wherein it is provided that it is unlawful for one to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." (Tr. p. 132, lines 6-11). However, the trial judge went forward with the following caveat:

> This however please understand is not a conclusion. Prima facie means just on the face of it. That is not an absolute conclusion. It is for you to take that as evidence. Prima facie on its face that there was the requisite intent to distribute. (Tr. p. 132, lines 14-18).

The court also went on to advise the jury that the State must prove beyond a reasonable doubt that Petitioners "possessed marijuana in this quantity of more than one ounce with the intention of distributing which has been defined as I've told you, to deliver." (Tr. p. 133, lines 1-3). Finally, since Petitioners did not testify in their defense, the trial court advised the jury that the defendants had the right to rely upon the presumption of innocence for the State to prove their guilt beyond a reasonable doubt. (Tr. p. 134, lines 2-12). It should also be noted that, upon request by counsel, the lower court submitted the lesser included offense of "possession without an intent to distribute." (Tr. p. 137, line 21-p. 138, line 9).

The reference in the statute to possession of more than one ounce of

marijuana as being "prima facie evidence" of guilt is an evidentiary device which sets forth certain basic facts for a jury to use in determining the existence of an element of the crime, here being intent to distribute a controlled substance, and it is a presumption which is rebuttable. State v. Byrd, 267 S.C. 87, 226 S.E. 2d 244 (1976). Such evidentiary devices do not offend the United States Constitution. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979); Barnes v. United States, 412 U.S. 837, 37 L. Ed. 2d 380, 93 S. Ct. 2357 (1973); Tot v. United States, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1942); State v. Crocker, 272 S.C. 344, 251 S.E. 2d 764 (1979).

In this case the jury was clearly advised that it was not required to find an intent to distribute, but, rather, it

was permitted to use this evidentiary device in rendering a verdict as to possession with intent to distribute, "simple" possession, or not guilty. Consequently, this case is distinguishable from Sandstrom v. Montana, supra, where the effect of the presumption was, under Montana law, to shift the burden of proof to the defendant, and where no qualifying instructions were used to emphasize the presumption's permissive nature. Id., 442 U.S. at 517-518, 61 L. Ed. 2d at 46-47. The Petition for Certiorari should be, accordingly, dismissed.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Attorney General

BRIAN P. GIBBES
Senior Asst. Atty. General

ATTORNEYS FOR RESPONDENT.

APPENDIX

...I tell you that under the law applicable to this case, possession of more than 28 grams or one ounce, one shall be prima facie guilty of the offense wherein it is provided that it is unlawful for one to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance. (Tr. p. 132, lines 6-11).

...possessed marijuana in this quantity of more than one ounce with the intention of distributing which has been defined as I've told you, to deliver. (Tr. p. 133, lines 1-3).

Ladies and gentlemen, I tell you further that the failure of either of these Defendants to testify in their own Defense is not to be considered by you in the slightest extent. As I told you earlier, they have a right to rely upon the burden of the State to overcome the presumption of innocence and as I've told you, they are not required to prove their innocence; but it is always the burden of the State to prove that they are guilty beyond a reasonable doubt. You are not to let their failure to testify influence your decision to the slightest degree; nor is it to be mentioned or discussed during your deliberations. (Tr. p. 134, lines 2-12).

Mr. Foreman, ladies and gentlemen, I charge you that where one is charged with possession of marijuana with intent to distribute, that there is included within that offense the lesser charge of possession without an intent to distribute so depending upon your view of the evidence, you may find either or both of these Defendants

guilty or not guilty of the lesser offense of possession. So consequently that would mean then you have to have some other forms of verdict. I will write these out for you, Mr. Foreman, and send them in to you so you can use that language in developing whatever your verdict is. So I'll write these alternate forms of verdict out for you and send them in there to you. So now if you will please go to your room and you can begin your deliberations. (Tr. p. 137, line 21-p. 138, line 9).